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custody of a parent the presumption is rebuttable."[19] Still other courts make no finding of the parent's fitness or unfitness but award the custody of the child on the basis of its welfare and best interests.[20] On the whole, the courts today seem to be carefully weighing the facts, giving some consideration and weight to the fact that one party is a parent, and then making a decision as to what is best for the child, as in the principal case.

In view of the full and complete findings in the principal case by the trial courts and the discussion and application of the modern American view of custody controversies between parent and nonparent by the supreme court, it is hoped that the common law view of the primary right of a parent to his child (which must prevail unless the parent is shown to be unsuitable) is now overruled in North Carolina.

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Domestic Relations—Divorce—Abandonment as a Defense to Divorce on the Ground of Two Years Separation

In order to illustrate clearly one problem in North Carolina divorce law, this hypothetical situation is posed: a married man living in North Carolina decides that he can no longer live with his wife in harmony, although she has not been guilty of any misconduct which would be grounds for divorce. He desires a divorce but his wife is not willing to give him one. Could this husband separate from his wife for a period of two years, continue to support her throughout this period, and then obtain a divorce on the ground of two years separation under G.S. § 50-6?[1]

The legislative history of divorce on the ground of two years separation in North Carolina seems to demonstrate that the legislature intended to authorize a divorce by either party upon living separate and apart for a period of two years irrespective of how the separation came about.[2]

[19] Finken v. Porter, 246 Iowa 1345, 1348, 72 N.W.2d 445, 446 (1955).

[20] Henry v. James, 222 Ark. 89, 257 S.W.2d 285 (1953); Prince v. Carrington, 62 So. 2d 77 (Fla. 1952); Holmes v. Sanders, 243 N.C. 171, 90 S.E.2d 382 (1955). This has led at least one writer to say, "Moreover, a divorced spouse would do well not to allow the children to become overly fond of the baby sitter." Note, 7 ARK. L. REV. 405, 408 (1953).

[1] N.C. GEN. STAT. § 50-6 (1950) provides: "Marriages may be dissolved and the parties thereto divorced from the bonds of matrimony on the application of either party, if and when the husband and wife have lived separate and apart for two years, and the plaintiff or defendant in the suit for divorce has resided in the State for a period of six months. This section shall be in addition to other acts and not construed as repealing other laws on the subject of divorce."

[2] N.C. GEN. STAT. § 50-5(4) (1950), originally enacted in 1907, authorizes divorce upon a separation for a specified period, but the court has held that the plaintiff had to establish that he was the injured party. Sanderson v. Sanderson, 178 N.C. 339, 100 S.E. 590 (1919). Then in 1931 N.C. GEN. STAT. § 50-6 (1950) authorized divorce on the basis of separation without mentioning that the plaintiff

The court has not so interpreted G.S. § 50-6. It has held that a party should not be allowed to take advantage of his own wrong and that, therefore, the plaintiff will be denied a divorce if it is established that he has abandoned the defendant.[3]

Inasmuch as the court was restricting the broad language used by the legislature in G.S. § 50-6 when it held that a plaintiff who abandoned a defendant would be denied his divorce, would it not have been reasonable to assume that the court would require the abandonment to be criminal in nature?[4] The earlier cases of *Hyder v. Hyder*[5] and *Byers v. Byers*[6] indicated that the court did mean criminal abandonment, but the more recent case of *Pruett v. Pruett*[7] indicates that something short of criminal abandonment will suffice.

The question in the *Hyder* case was whether the jury had been properly instructed as to the elements of criminal abandonment. The court held that the charge was correct and the divorce was properly denied because the defendant had abandoned the plaintiff in the criminal sense and that he could not take advantage of his own criminal misconduct. This case clearly indicates that anything short of criminal abandonment would not have been a defense, since otherwise there would have been no need for the supreme court to consider the correctness of the lower court's charge as to criminal abandonment. It would have been much easier to state that *any* abandonment would be a valid defense.

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had to be the injured party. This tends to indicate that the legislature desired to authorize the divorce irrespective of how separation came about.

This 1931 statute provided, in part, that there could be a divorce on the application of either party if there had been a separation of husband and wife, whether under deed of separation or otherwise, and they had lived separate and apart for a specified period. Our court, relying upon the words "under deed of separation or otherwise," held that the separation had to be by mutual consent. Parker v. Parker, 210 N.C. 264, 186 S.E. 346 (1936).

In 1937 the statute was amended so that the phrase "either under deed of separation or otherwise" was taken out and only the words "living separate and apart for two years" were left. Thus it would appear again that by taking out of the statute the words causing the court to hold that the separation had to be by mutual consent, the legislature intended to authorize the divorce irrespective of how separation came about.

[3] Parker v. Parker, 210 N.C. 264, 186 S.E. 346 (1936); Reynolds v. Reynolds, 208 N.C. 428, 181 S.E. 338 (1935). The effect of this interpretation of G.S. § 50-6 and its amendments seems to be to shift the burden from the plaintiff to the defendant to show that the plaintiff is or is not the injured party. If the legislature had intended this it would have been much simpler to amend G.S. § 50-5(4) to add that the burden is on the defendant to establish that the plaintiff is not the injured party.

[4] N.C. GEN. STAT. § 14-32 (Supp. 1957) provides that the two requisites for criminal abandonment are a willful abandonment and a willful failure to provide adequate support.

[5] 215 N.C. 239, 1 S.E.2d 540 (1939).

[6] 222 N.C. 298, 22 S.E.2d 902 (1942).

[7] 247 N.C. 13, 100 S.E.2d 296 (1957).

The *Byers* case also implies that criminal abandonment is required. The court, citing the *Hyder* case, said:

> [A] husband is not compelled to live with his wife if he provides her adequate support. It must, therefore, be conceded that the law under review does not contemplate, as essential to an effectual separation under the statute, a repudiation of all marital obligations, which, of itself, would destroy his remedy.[8]

These two cases would indicate that the husband, in the facts supposed at the beginning of this Note, could get his divorce since he has continued to support his wife and is not guilty of criminal abandonment.

The more recent *Pruett* case indicates, however, that the husband in the supposed situation could not get a divorce, and that a mere separation of the husband from his wife without just cause is sufficient to defeat a divorce. In the *Pruett* case, the husband filed for divorce on the ground of two years separation. The wife filed a cross-action for divorce from bed and board. The jury found that the husband had willfully abandoned the wife and failed to provide her with adequate support and granted her a divorce from bed and board. Subsequently, the case was calendared as an uncontested divorce action, and the court granted the husband an absolute divorce without being aware of the fact that the wife had already been granted a divorce from bed and board in the same action. Thereafter the husband moved to have the divorce from bed and board set aside because, among other things, the wife had failed to allege that the failure to support had existed to her knowledge for at least six months prior to the filing of her pleadings. The court refused to set aside the divorce from bed and board (but did affirm the setting aside of the husband's absolute divorce because it had been granted in the same action in which the divorce from bed and board had been granted), stating that abandonment without a failure to support is sufficient to sustain a divorce from bed and board under G.S. § 50-7(1).[9] Had the court stopped at this point, the rules set out above as being supported by *Hyder* and *Byers* would not have been affected. But, the court went on to say that the jury finding of abandonment by the husband "defeated the plaintiff's action on the ground of such separation."[10] Since the court had said that the abandonment involved did not

[8] 222 N.C. at 304, 22 S.E.2d at 906.

[9] N.C. GEN. STAT. § 50-7 (1950) provides that a divorce from bed and board may be granted "if either party abandons his or her family." There is no doubt, from this wording, that the legislature intended to authorize a divorce from bed and board on the ground of abandonment without regard to a failure to support. This does not, however, appear to indicate that abandonment in this sense was intended to be sufficient to defeat an absolute divorce on the ground of two years separation. It is generally held that a ground for limited divorce is not a recriminatory defense to a ground for absolute divorce. MADDEN, PERSONS AND DOMESTIC RELATIONS § 91 (1931).

[10] 247 N.C. at 23, 100 S.E.2d at 303.

include a failure to support, the intimation is clear that the court considers abandonment without a failure to support to be sufficient to defeat a divorce on the ground of two years separation. This appears to be an unfortunate extension of the *Hyder* and *Byers* rules, which limited the abandonment that will defeat a divorce on the ground of two years separation to criminal abandonment.

The policy of granting a divorce upon the ground of living separate and apart seems to be that it is to the best interests of society and the parties, where the marriage has factually ceased to exist and there is no intention to resume it, to put an end to it legally. The number of jurisdictions which have this provision has grown rapidly in recent years.[11] In some states relief is denied the petitioner on account of his wrongdoing,[12] but in several jurisdictions fault is not decisive.[13] Arkansas has affirmed a decree in favor of a husband although he was alleged to be a deserter living in open adultery.[14] Apparently there is a growing conviction in the United States that a marriage which has ceased to exist as a fact does more harm than a divorce.[15]

It is to be hoped that future decisions will settle the interpretation to be given G.S. § 50-6. In view of the growing liberalization throughout the country and the already liberal wording of the statute, it is submitted that nothing short of misconduct in the criminal sense should be allowed to defeat an action for divorce under this section.[16]

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[11] KEEZER, MARRIAGE AND DIVORCE § 455 (3d ed., Moreland 1946). Nineteen states, the District of Columbia, and Puerto Rico make living apart for a specified period without cohabitation cause for divorce. Of these 21 jurisdictions, 6 have statutes as broadly drawn as North Carolina. They are Arizona, Arkansas, Kentucky, Louisiana, Maryland, and Texas.

[12] Gee v. Gee, 249 Ala. 642, 32 So. 2d 657 (1947); Campbell v. Campbell, 174 Md. 229, 198 Atl. 414 (1938); West v. West, 115 Vt. 458, 63 A.2d 864 (1949); Powless v. Powless, 269 Wis. 552, 69 N.W.2d 753 (1955).

[13] Cotton v. Cotton, 306 Ky. 826, 209 S.W.2d 474 (1948); Otis v. Bahan, 209 La. 1082, 26 So. 2d 146 (1946). See Annot., 152 A.L.R. 336 (1944).

[14] Young v. Young, 207 Ark. 36, 178 S.W.2d 994 (1944).

[15] KEEZER, *op. cit. supra* note 10 § 455.

[16] Either husband or wife may get a divorce two years after a divorce from bed and board or two years after a separation agreement, for a separation coupled with continued support under either of these circumstances is legal. Cameron v. Cameron, 235 N.C. 82, 68 S.E.2d 796 (1952). Why should there be a distinction drawn between these "legal separations" and the one supposed at the beginning of this Note, insofar as the husband's right to obtain divorce is concerned?

The answer to this is a practical one. In the cases first put the wife is probably getting alimony and such alimony will survive a divorce decree, while in the latter situation the wife cannot be awarded alimony incident to an absolute divorce. The court seems to be trying to protect the wife's right to alimony in the face of North Carolina's rule as to no alimony as an incident to an absolute divorce. See Note, 31 N.C.L. REV. 482 (1953), for a discussion of this point.